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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 920. 461.

IN THE MATTER OF THE PETITION OF THE

WESTERN UNION TELEGRAPH COMPANY ET AL

FOR WRIT OF CERTIORARI.

TO BRING UP FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT THE CASE,

WESTERN UNION TELEGRAPH COMPANY ET AL.,

Complainants,

v.

AMERICAN BELL TELEPHONE COMPANY,

Defendants.

BRIEF FOR THE AMERICAN BELL TELEPHONE COMPANY, IN OPPOSITION TO THE PETITION.

JAMES J. STORROW,
of Counsel.

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Supreme Court of the United States.

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No. 920.

The *Western Union Telegraph Company* et al., *Petitioners* for *certiorari* to bring up from the United States Circuit Court of Appeals for the First Circuit the case,

WESTERN UNION TELEGRAPH CO. ET AL.,
Complainants,
v.
AMERICAN BELL TELEPHONE CO., *Defendants.*

BRIEF FOR THE AMERICAN BELL TELEPHONE CO., IN OPPOSITION TO THE PETITION.

THE CASE.

This is a suit in equity by the *Western Union Telegraph Company et al.*, against the *American Bell Telephone Company*, brought in 1883.

The bill set out an indenture, and showed that under and by virtue of it the Bell Co. was bound to account to the plaintiffs for one fifth of a certain class of its receipts, and was not to account to the plaintiffs for, but was to hold solely to its own use, other receipts; it stated that the Bell Co. had accounted for some of its receipts, and had refused to account in respect of certain other property received by it; it averred that this latter property, consisting of certain corporate stocks, was or represented receipts of the class which were to be divided between the two parties, and asked for an account and for a transfer of one fifth part of it.

The answer admitted the execution of the indenture, and admitted that the American Bell Telephone Company though not a party to it, and not in existence at the time the contract was made, had assumed the obligations thereof in place of the National Bell Telephone Company, party thereto. It averred that these stocks claimed were, or represented, receipts and profits which were not of the divisible class, and that, by the agreement, they were left the exclusive property of the defendant.

After the case had been pending seven years, and the testimony had been completed, it was tried on its merits before a special master, under an order of reference made by consent (Rec., pp. 79–80), conferring broad powers similar to those which were defined and commented on in *Kimberly* v. *Arms*, 129 U. S. 612. The master, passing upon the merits, after a full argument upon a thousand pages of proofs, decided that the property in dispute belonged to the defendants, that the plaintiffs had no interest in it, and, therefore, that the plaintiffs were not entitled to relief; and he announced this decision to the parties by communicating to them his conclusions (pp. 143–154; pp. 23–7, *infra*), in the mode in which the law and the practice requires a master to communicate his conclusions to the parties before filing his more formal report.

The plaintiffs then asked for leave to take additional testimony and for a rehearing thereon, which motion the master, after argument, refused. Both parties then filed with him "objections" to his report, as the practice requires them to do, in order that these "objections" may be returned by him with his report, and form the basis of "exceptions" afterwards to be taken in court. Because the general rule is that the court will not entertain "exceptions" to the report, unless the alleged errors have been directly brought to the master's attention by "objections" filed before him; for which purpose he is directed, in the first circuit at least, as in England, to show his report to the parties before filing it.

This having been done, and while the master was putting his papers in order to file in court, but before he had actually filed them, the Western Union Company asked for a decree dismissing the bill "without prejudice," to the end that they might bring a new suit wherever they saw fit. *They did not attempt to show nor aver any reason for this, and have never averred nor attempted to show any;* and still rest their motion upon the proposition that *the plaintiff had* **an absolute right** not only to a "dismissal," but to a dismissal "**without prejudice**" at that stage of the case, and that the court had no discretion to refuse it.

The circuit court took that view, and, *upon that ground alone*, made a final decree dismissing the bill "without prejudice" (p.172). The circuit court of appeals decided that no such *right* existed, and that the case should therefore follow its regular course.

Soon after the motion to dismiss was filed, but before that motion came on to be heard, the master filed his formal report, with a copy of all the proofs, as the order of reference required. If this court does not interfere, the parties thus have, in the circuit court, a filed report on the merits, which they spent eight years in obtaining. The plaintiff has the usual courses open to him. He can ask leave to have the case dismissed without prejudice *for cause shown*. He can, upon exceptions or otherwise, have the report recommitted for further general hearing if there ought to be further hearing; or have it corrected or reversed on the evidence which accompanies it, if erroneous. The order of the court complained of is not an order which in any way abridges the full power of review and control which the courts have over master's reports; but is, in form and in substance, an order that the trial of the merits, which has passed the stage before the master, shall now be completed by the hearing of the appeal from the master to the court.

I. The Certiorari ought not to be Granted; and why not.

We shall address to the court three propositions, to show that the decision complained of is not of the kind which this court will bring up for review by *certiorari*.

1. The order of the circuit court of appeals is an order that the trial of the case shall proceed in the usual way. It does not touch the merits, but merely a question of practice.

2. The practice it lays down is so intrinsically right that, if it be not already established, the court could and ought to make a rule to establish it for the future.

3. The authorities are so absolutely clear and unanimous that the case had reached a stage where the plaintiffs' right to dismiss had ceased, that the question does not present any serious controversy.

Each of these three propositions is true; and, under the rules laid down by this court, each one states a case in which a *certiorari* will not issue.

We proceed to examine them in detail.

1. *The order of the circuit court of appeals is simply an order that the trial of the merits of the controversy shall be completed in the usual way. It does not touch the merits, nor direct any new or special mode of trying them. It does not disturb the pre-existing possession or enjoyment of the property in dispute.*

It is plain, therefore, that the order of the circuit court of appeals, here sought to be reviewed, is not an order which ends the case. It is an order that the case stand for trial before the court on the merits. It is an order which is not appealable. *Meagher* v. *Minnesota Co.*, 145 U. S. 608, 611, and cases cited. When a final decree shall have been reached, a petition to bring up the whole case, would, if successful, bring up the order here complained of as part of

it. But the present petition is an attempt to bring up *an interlocutory ruling that the trial is to be completed in the usual way;* an attempt to bring up that question on a record which would exclude this court from considering the merits of the case. There is no justification for such piece-meal revisions.

For the order complained of does not pass upon any part of the merits; it does not touch any question which has any bearing upon the merits. It raises no question of jurisdiction or of capacity in the court. It has no immediate effect upon the status of property or the interest of parties, as an order for an injunction, or for the sequestration of property, or for taking it out of the possession of its owner by a receivership, does. On the contrary, the plaintiffs' attempted action, if permitted, would leave the property where it has always been, in the hands of the defendant.

The defendant is, as it has always been, in the unrestrained possession and enjoyment of it, and it is the *defendant* who insists that, after twelve years of litigation, in a court of the plaintiffs' own selection, the dispute which clouds its title ought to be now ended. Nor is there anything in the order which can produce embarrassment in the conduct of the case. It simply leaves it to be completed in the ordinary way and in the ordinary course. Moreover, if on the hearing of exceptions the master's report shall be set aside, this order becomes immaterial; and much more expense and labor has been expended upon this attempt of the plaintiffs to escape the completion of the trial on the merits than will be required to reach a final decree.

Thus the case is entirely within *Am. Constr. Co.* v. *Jacksonville Railway*, 148 U. S. 372, where the court said (p. 384):

"There are much stronger reasons against the interposition of this court to review a decree made by the Circuit Court of Appeals on appeal from an interlocutory order, than in the case of a final decree. . . . Many orders made in the pro-

gress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

"This power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court."

Woods, Petr. for Certiorari, 143 U. S. 202, presented essentially the same question which this petition raises. The circuit court of appeals there held that the dismissal of a certain former suit was not a bar to the action. This court refused a *certiorari* to bring up that question, saying that it did not fall "within the category of questions of such gravity and general importance as to require a review of the conclusions ot the Circuit Court of Appeals in reference to them."

The prayer that our suit, where the merits have been fully tried and decided by the master, whose conclusions only await the revision of the court, may be dismissed so as to allow the plaintiff to initiate new litigation, certainly does not present a question of any such high order.

We submit that the present case cannot be ordered up without disregarding both the foregoing and other considerations by which the court has declared itself to be governed.

The purpose of the motion is obvious. The report is so clear and convincing that the plaintiffs are conscious that they have little hope of reversing it on exceptions. In a new suit their position cannot be changed for the worse; any change would be for the better; they want that chance. The beaten party usually wants a new trial, because he is beaten; but that is not a reason for granting one.

2. (*a*) *The only question open under the* certiorari *asked for, is such that a reversal of the decision below would produce no juridical effect worth the trouble.*

(*b*) *Moreover, that decision is so* intrinsically just *that this court will not exert an emergency power for the purpose of questioning it.*

The action of this court upon various petitions for *certiorari* under the circuit courts of appeals act has made it plain that decisions attacked for alleged errors of judgment, where the court had jurisdiction and the judges were qualified to act, will not be ordered up for review except to "avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters." *Woods, Petr.*, 143 U. S. 202, 206. It is to "be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Am. Constr. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 383.

Of course the phrase "diversity of judgments" means such differences in the judgments in different circuits that the law will not be the same throughout the country unless this court interferes. It does not mean a case where the circuit court differed from the circuit court of appeals. It must be said, however, that the opinion of the learned judge in the circuit court shows that he failed to appreciate what the case was.

Moreover, the diversity which this court must interfere to prevent, is diversity in the law which governs *rights* of persons or property, and not diversity of practice or procedure. The latter differs in the federal courts in every State in suits at law, and even in equity the practice varies greatly in the different circuits. The judges of each circuit can, within wide limits, establish their own practice by rules or decisions, and the Supreme Court will not revise that practice unless there be a case of gross injustice and oppression. R. S. 918; *Duncan* v. *United States*, 7 Pet. 435.

Indeed, this court construed the old law which permitted cases to come up on a certificate of division of opinion, so as to limit it to questions of law, affecting the ultimate rights of parties. *Waterville* v. *Van Slyke*, 116 U. S. 699, 704; *United States* v. *Waddell*, 112 U. S. 76, 81; *Williamsport Bank* v. *Knapp*, 119 U. S. 357, 360. So also, *Mahan* v. *United States*, 14 Wall. 109; *United States* v. *Pugh*, 99 U. S. 265.

The case does not present the element of "diversity of judgments." Every decision of every federal court is in conformity with the decision here complained of. It exactly follows the rule laid down by Justice WOODBURY in 1848 as *the law of the first circuit* and as the practice in all courts. It does not conflict with any decision ever made by any court, except an Illinois decision so extraordinary that the circuit court declined even to cite it as an authority.

This court has plainly intimated that, unless in some extraordinary emergency, it will not order up a case except upon a question of law which ought to be settled for future guidance; and it was made clear in *Woods, Petr.*, 143 U. S. 202, 206, and more especially in *Lau Ow Bew, Petr.*, 141 U. S. 583, that not even questions of law will be brought up unless they are such that (1) the judgment of the circuit court of appeals, if wrong, may lead to grievous results, and in which (2) the question is "sufficiently open to controversy."

Such considerations put this case outside of the class which will be ordered up.

II. THE CASE IN ITS BROAD ASPECT AND SUBSTANCE.

Stripped of all technicalities (which we shall also examine presently) the case is this:

The parties agreed that the merits of the controversy should be referred to Hon. John Lowell as special master, and the court thereupon made a decretal order so referring it (p. 14, *infra*). Before him the parties laid all the evidence at great length. He reached the conclusion that the

right was with the defendants, and therefore that the plaintiffs were not entitled to relief; and this conclusion he announced to the parties in the mode required by law.

Upon this it was and still is the right of either party to have the report set aside or recommitted on motion, if the master had exceeded his powers, or if the hearing before him had failed to afford a fair and proper trial. But nothing of this sort has been done or attempted.

It was and is also the right of either party, upon exceptions, and upon the evidence all of which the master has reported in obedience to the order of reference, to bring the correctness of the master's conclusions before the court for review and have them set aside or disregarded if found erroneously. The plaintiffs entered upon this course. They filed before him, prior to May 7, 1891 (p. 187), those "objections" to his report which the law requires as the basis for the subsequent "exceptions." Then they changed their plan. They asserted that they had the absolute right and power to, in effect, disregard and set aside as null the conclusions of the master, and to do this at their own pleasure, if they saw fit, without assigning reasons. Thereupon, on June 1, 1891 (p. 122), they moved for a decree of dismissal "*without prejudice*," so that they might bring a new suit, blotting out the present suit and all there is in it.

The court of appeals denied that right, and refused the decree so asked for; and this left the case to proceed in the usual way. A *certiorari* will bring up the correctness of that decision as to how the case shall proceed, but it will not bring up the merits nor any question affecting them. No question of the correctness of the master's report has yet been brought before any judge.

It is obvious that if the alleged right exists, it can be exercised in a future case as well as in this. Our opponents' proposition, therefore, is that when the merits of a case have been fully tried before a master empowered to decide them,

and when his matured conclusions have become known, not from his comments at the trial, nor from judicial indiscretions, but by the formal communication of them in the mode required by law, the *plaintiff* (but not the defendant) may, at his pleasure, repudiate and annul the whole proceeding, and try his case afresh, in a new suit, provided counsel are quick enough to do this after the conclusions are announced, and before the formal expression of them is filed in the clerk's office; and that this right is so absolute that the court has no power to prevent its exercise.

Such a right, if it exists, would bring the administration of justice into contempt. It would make the plaintiff, and not the court, the controlling power. *The whole machinery for revising a master's report would become a dead letter whenever the report was adverse to the plaintiff.* Such a thing never has been done, and if anything in the practice made it possible the court would instantly change the practice. The decision, therefore, is *intrinsically* just and right.

We also submit, and shall presently show it to be perfectly clear, that the decision was exactly according to precedent. But suppose that be doubted, what should this court do? The rule laid down, that when the plaintiff has spent ten years in trying his case, and has obtained the opinion of the tribunal chosen by him, he cannot repudiate its authority and begin afresh at his own pleasure, does not affect the *ultimate rights* of persons or property in the community, nor the merits of the controversy between these parties. It touches solely a question of *procedure*, which it is well settled (pp. 11, 42, *infra*) may be regulated by the court. If this court should reverse the decision, the decent administration of justice would require this court, or the circuit court, by a new rule under R. S. 918 (which allows the circuit court to make rules) to make the practice in the future what the decision says it is already. In 1848 Justice WOODBURY examined the whole question of the plaintiff's right to dis-

miss, and laid down rules which govern the present case (p. , *infra*). *That decision establishes and the present one confirms that practice for the first circuit.* In *Duncan* v. *United States*, 7 Pet. 444, the question was whether the court below had conformed to its own practice, and this court said (p. 451):

"It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court."

"On a question of practice, under the circumstances of this case, it would seem that the decision of the district court, as above made, should be conclusive. How can the practice of the court be better known or established than by its own solemn adjudication on the subject?"

Such a case, we submit, will not be ordered up.

Let us make sure that the case is exactly what we have stated.

III. Statement of the Case in Detail.

The suit was brought in 1883. On May 28, 1886, by consent, and upon the request of the parties, the court made an order (p. 80), referring the case to Hon. John Lowell as master. It was one of those broad references of the whole case to a special master which this court defined and upheld in *Kimberly* v. *Arms*, 129 U. S. 512, 524 (decided March 5, 1889). In that case the court said that such a reference was not a mere submission to a friendly arbitration *in pais*, but a submission to *a tribunal established by law*.

It decided that, generally speaking, a chancellor had not the power to make such a broad reference, but that, when the parties consented, he might; and that a decision of the master, made upon the whole case, had all the legal value which usually belongs to a master's report. It said (p. 524):

"his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration — a proceeding which is governed by special rules — is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice *in tribunals established by law*. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

Davis v. *Schwartz*, 155 U. S. 631, 636, affirmed *Kimberly* v. *Arms*, and pointed out that the master's findings under such a reference carried the same weight as findings under the older and narrower references. The reference in that case, which the court held to be of the same character as that in *Kimberly* v. *Arms*, was, as stated by the court, to a master, to report "the facts of the case and his conclusions of law thereon," which is almost literally the language of the reference in our case. We refer also to the authorities cited in *Davis* v. *Schwartz*, some of which are noticed on pp. 14, 15, *infra*.

Harrison's Ch. Pr., vol. ii, p. 154, expresses also the legal value of a master's report unless and until reversed or modified on exceptions: "*a report made by a Master is as a judgment of the court.*" It is not denied here that a report filed by a master would terminate the plaintiff's right to dismiss without predudice as completely as a decision and decree by the court.

The value of a master's report is well recognized to be far beyond that of a verdict on an issue out of chancery. The verdict is advisory only. The chancellor adopts it or disregards it according to his own notions. But the report of a master stands, unless clearly shown to be unwarranted

by the evidence. *Davis* v. *Schwartz* states the long-settled rule upon the subject.

Moreover, a verdict is merely material for consideration by the chancellor. The case must be brought on for hearing on the merits, and the verdict stands for nothing, unless, on a hearing, he adopts it.

But by Rule 83, a master's report becomes, of itself, absolute and conclusive, and *stands confirmed ipso facto*, without a hearing, unless before the next rule day it be actively assailed and positively overthrown.

Some suggestions by the petitioners that the master's report is a decision of a low order are therefore unfounded. *In truth it is because of its high legal value that they selected a gentleman of judicial training to make it, and that they are ready to throw overboard twelve years of expensive litigation in order to get rid of it.*

The parties tried this whole case before the master as upon such a broad reference, *after* Kimberly *v.* Arms *had pointed out the value of his decision to the one in whose favor it might be.* They laid before him all the testimony already taken in the cause and introduced further proofs, to the extent of a thousand pages in all, and the case was argued for several days orally, and afterwards in print, at much length. These arguments went to the whole merits of the case, and were devoted to ascertaining the true meaning and scope of the contract, the nature of the property in dispute, and the rights of the parties with relation to it. The master heard them, and after lengthy consideration reached his conclusions and expressed them, as the law required, in a formal written report, which he formally announced and published to the parties in the mode required by law.

The petitioners suggest that the reference in this case is not of the broad character illustrated in *Kimberly* v. *Arms*. But (*a*) there is no foundation for such a suggestion; nor (*b*) would it be material if there were.

(*a*) The pleadings (*v.* p. 2, *supra*) narrowed the actual controversy to one question: Is the property in controversy of that class which the contract gives the plaintiffs a right to share, or of the class which belongs to the defendant alone. This, which went to the whole merits, naturally raised questions of fact and questions of law, or, to state it otherwise, questions of law arising upon facts to be found.

Now the case (as thus left by the pleadings), and *the whole of it*, was referred, and the master was to report both his conclusions of fact and his conclusions of law. The agreement and the decretal order both were (pp. 79–80),

"that the above-named cause be referred to Hon. John Lowell as Master to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case."

That is to say, the Master was to find all the facts, without restriction, and he was to pass upon every question of law "arising in the case." He was to set out all these conclusions in such a way that they could be reviewed on exceptions, and he was to report the testimony so that his findings of facts could be compared with the proofs. When this was done there was *nothing else* left in the case to be passed upon, but only his report to be reviewed.

In *Kimberly* v. *Arms*, 129 U. S. 512, 516, 525, the reference directed the master

"to hear the evidence and decide all the issues between the parties and make his report to this court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become part of the report, which report shall be subject to like exceptions as other reports of masters."

Here was no reference, in so many words, of "the whole case." But a direction to decide the facts, and to report his findings of law, was considered a direction to report upon the entire merits.

In *Crawford* v. *Neal*, 144 U. S. 585, 596, the master

was ordered to take testimony "and to report to this court his findings of fact and his conclusions of law thereon." *Furrer* v. *Ferris*, 145 U. S. 132, 134, was a similar case. The court classed these under *Kimberly* v. *Arms*, which it cited.

In *Davis* v. *Schwartz*, 155 U. S. 631, 633, 636, the reference was "to hear said causes and report to this court his findings of fact and conclusions of law." The language is almost identical with that in our case; and this court, discussing the matter at some length, held that the rule of *Kimberly* v. *Arms* applied.

(*b*) We need not, however, discuss the wording of our order. For *both* parties, as well as the master, treated it as including the whole case, and thus, at a trial begun in March, 1890 (record, p. 155), a year after *Kimberly* v. *Arms* had determined the effect of such a trial, they laid before him all the evidence taken in the cause; and additional papers referred to in the proofs were introduced to the extent of a great many hundred pages (p. 80 *ad fin*; p. 162; p. 135). What the parties actually tried before him were the merits of the whole controversy. The arguments show this; it has never been disputed. The Report is equally broad.

It is entitled in the cause, and is headed, "*Master's Report.*" It begins (p. 143; p. 123): "In pursuance of the rule of court, I have met and heard the parties by their counsel, and have examined the evidence, and I report as follows:" It then states the whole case, states (pp. 128, 148) the contentions of the parties as we have indicated them, discusses the facts and the law, and decides the whole case on the merits. It says:

"I am of opinion that by the contract the defendant clearly had the exclusive right, etc." (p. 153; p. 134). The defendant, the report says, considered that it was the exclusive owner of the stocks, which were the only property in con-

troversy, "and I so find" (p. 154; p. 134). "The conclusion is that the plaintiffs are not entitled to the account asked for" (p. 154; p. 135).*

Every line of it shows that it was *a decision*, a decision on the whole merits, and completely and hopelessly adverse to the complainants.

The plaintiffs next made it clear that it was a decision, and a deliberate and careful one, not reached by any inadvertence or accident. For they asked leave of the master to reopen the case, to take additional depositions, and to argue *the new evidence*, which motion, after hearing, he refused (p. 136). Such a motion for a rehearing assumes that there has been a decision. *Cf. San Pedro* v. *United States*, 146 U. S. 120, 137, and cases on p. 25, *infra*.

There has never been any complaint that the master exceeded his powers. Both parties actually and elaborately tried the entire merits before him, and desired that he should pass upon them. Plaintiffs' "exception" 21 is (p. 193) that the master "should have found, under the testimony and the facts adduced in this case, that the complainants are entitled to the account asked for." There is not in the "objections," nor anywhere in the record, any suggestion that the master exceeded his powers.

(c) But, for the purposes of this argument, it would not be material if the master had exceeded his powers. That question is open, in due course, upon exceptions to his report or upon a motion to set aside. It has never been raised. The position of the plaintiffs is that they do not wish to submit the master's conclusions to the court, but that they have the right, *themselves*, to set them aside and annul them. The question is whether the court or the plaintiff is to control the

* These citations refer both to the "draft report" and the finally filed report, which are identical (with a few slight and purely verbal variations) in these respects.

report; and therefore it is not very material what the plaintiff's reasons of dissatisfaction are. But it is evident that the plaintiff's sole grief is that *there is a decision of the master*, within his powers, but adverse to the plaintiffs.

(*d*) Nor is it in any way material to the present petition whether the master's powers were as broad as those in *Kimberly* v. *Arms*, or less broad. *Something* of moment was referred to him; and, upon the hearing of exceptions to his report, the defendants stand with the benefit of the presumptions attaching to a master's report for all that he is entitled to pass upon, be it more or less. The parties selected a trained judicial mind because they both knew the presumptions which attach to such a report; the plaintiffs now wish to get rid of it because they know its just and its legal value.

It is obvious that if the alleged right exists, the plaintiffs can repeat this performance in every succeeding suit on this cause of action. They may experiment with every court in the United States (for state courts habitually take jurisdiction wherever they can find property of the defendant and compel an appearance by sequestration — *Pennoyer* v. *Neff*, 95 U. S. 714, 723) obtaining judicial opinions on approbation, and repudiating them if adverse; so that the power of a court to enforce judicial conclusions after they have been announced will depend upon the approval of them by the plaintiffs and not upon the law of the land.

That such conduct can be permitted is not thinkable in any system of jurisprudence. The courts have often decided that the fact that such consequences might ensue from a right claimed, shows that the right does not, in law, exist.

Rosenthal v. *Coates*, 148 U. S. 142, 147. The case had been argued in the state court and an opinion delivered, but the decree had not been made. The party, upon the ground that until a decree had been entered, nothing, in legal effect,

had been done,* undertook to remove his case to the federal court. This court said:

"To sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the state court, and upon an adverse decision, then transfer it to the Federal court. Here, Rosenthal has gone through the state trial and appellate courts, and his *rights have been finally declared* by the Supreme Court of the State; and *though as yet no formal decree has been entered in the trial court*, it is none the less true that he has experimented with the state courts and been beaten, and now seeks a different forum."

In *Removal Cases*, 100 U. S. 457, 473, the court said that the right to remove will not "allow a party to **experiment on his case** in the State court, and if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal."

Other cases to the same point are on pp. 21–2, *infra*.

IV. The Decision of the Circuit Court of Appeals was both just and strictly according to the universally established Precedents.

The decision of the Circuit Court of Appeals is so clearly in accordance not only with the due administration of justice but with the established practice and precedents that, under the rules laid down in the cases cited on pp. 5–7, *supra*, no *certiorari* should issue.

The plaintiffs assert an absolute *right* to enter at their pleasure a dismissal without prejudice, under the circumstances and for the purposes just stated. Their motion for such a dismissal was rested upon the ground of absolute

* Which is essentially our case. For in that juncture a rehearing may be asked for, and the court may change its mind. Yet certainly it will not be contended that a motion for a rehearing wipes out the conclusions announced on which a rehearing is to be had.

right, and not upon any allegation or showing of cause. The circuit judge allowed the dismissal upon the express ground that such was their *right*, and that he had no discretion to refuse (p. 174). Now it is settled that a dismissal asked for or granted upon *that* basis, cannot be allowed; nor can its allowance be sustained on appeal, upon the suggestion that the judge had a discretionary power to allow it for cause shown. *Truro* v. *Atkins*, 122 Mass. 418, *per* GRAY, C. J., and cases cited.

The inquiry, therefore, is limited to the question of absolute right in a plaintiff in equity, at his own pleasure, to have a dismissal "without prejudice." Consequently the decisions which, *for cause shown*, have discharged an agreed statement of facts, or set aside a reference, or allowed a dismissal, have no bearing here. Of such a character are various authorities cited by the petitioners in their brief.

Likewise, the cases where dismissals have been allowed *at law* have no bearing here. For they rest upon an ancient and purely technical formality (p. 32, *infra*); and States which still retain the common law (and retain it because they have civilized it) have, for the sake of justice, refused to admit that older practice. They hold, even in law, to the rule which has always prevailed in equity, that when the parties have once entered upon the trial, and still more when the hearing has been completed and the case taken under consideration, the plaintiff's right to dismiss at pleasure has ceased. They do this upon the ground that "this rule is eminently just," and that to permit the plaintiff to "experiment with the court," obtain an expression of its judgment after a hearing, and then withdraw in order to seek another tribunal, is impossible in any sustem of jurisprudence.

This broad view of the matter, and the fact that this court and other courts have based decisions upon such a view, go directly to the root of the present case. Such authorities expose the true character and purpose of the present attempt;

and therefore it is convenient to offer those authorities at the outset.

Rosenthal v. *Coates*, and *The Removal Cases* (p. 18, *supra*), agreeing with a long series of others now to be cited, establish that the court would not construe even a statute so as to allow a party to "experiment with the court"; to obtain an official expression of its conclusions, and then, when the case was ripe for a motion for rehearing (or still more when, as here, such motion had been made, heard and denied), to seek another forum; if only counsel could be quick enough to file a motion to dismiss after they had learned the conclusion and before the court had entered the formal decree or order.

That leading thought of jurisprudence governs this case with peculiar force. There is here no iron statute. The petitioners' proposition is that the rule requiring draft reports, which has existed for two centuries, and the decisions about the right to dismiss, have created in the plaintiff (but not in the defendant) this right to try the case and obtain, on approbation, opinions which the plaintiff may disregard at pleasure. *No case can be found in which this has been done*, and it is safe to say that no court will ever give such effect to its freely-made rules, or would allow its rules to remain unchanged for a day if such effect had ever been seriously asserted for them. This, we submit, is conclusive.

The other authorities on this general topic are the following:

Haskell v. *Whitney*, 12 Mass. 47, 49. By a rule made upon consent, the case was referred to referees whose power would be the same as that of a master, and whose report would have even less effect than a master's report, under *Kimberly* v. *Arms*, viz.: if at the hearing before the referees either party failed to appear, the hearing could go on *ex parte;* and the report, if accepted by the court, became the basis for a judgment. Before the hearing, the plaintiff moved for leave to discontinue *as of right*. The court, carefully

distinguishing between what the plaintiff could do as of right, and what the court might do for cause shown, refused. It said:

"He has no such right" at this stage. Our rule of reference is not like the English rule. We do not issue an attachment for disobedience of the rule. If either party fails to appear before the referees the other can proceed *ex parte*, and "judgment shall be entered according to the report of the referees, when accepted by the Court."

"By such an agreement, the parties put themselves on trial before the Court, and neither party has any more right to stop the progress of that trial than if it were a trial before the jury.

"After such a reference of all demands between the parties, each party becomes in effect *actor*."

"We are, therefore, of opinion, that the plaintiff cannot, at his pleasure, rescind this rule, and revoke the submission; and as **he cannot do it directly, so he cannot effect the same object by a discontinuance or a non-suit.**"

Shaw v. *Boland*, 15 Gray, 571, pointedly affirmed this rule. The court said:

"And this law seems to us to be eminently just. As a non-suit is no bar to another suit for the same cause of action, a plaintiff might harass a defendant by unlimited litigation, if the court had no authority, in any case, to prevent a non-suit."

Truro v. *Atkins*, 122 Mass. 418. "A plaintiff has the right to become non-suit at any time before trial, but after the trial has been begun, he cannot become non-suit except by the leave and at the discretion of the court. *Shaw* v. *Boland*, 15 Gray, 571. In the present case, the trial having been begun, and the question of law reserved at the trial being still undisposed of, the ruling by which the demandant was allowed to become non-suit as of right and of course, against the objection of the tenant, and without any exercise of discretion on the part of the court, was erroneous."

Locke v. *Wood*, 16 Mass. 317. Trial; sealed verdict brought in. Before it was recorded and before it was announced in court, the plaintiff asked leave to discontinue. PARSONS, C. J., refused, "**thinking that the verdict might have**

been communicated to the parties." Held by the full court that he had no right to a non-suit under the circumstances.

Cozzens v. *Sisson*, 5 R. I. 489. "We are not disposed to allow the plaintiffs to open a new litigation concerning rights, in the adjustment of which we have proceeded so far, at their instance."

Bank v. *Rose*, 1 Rich. Eq. (S. C.) 292. The case was argued and submitted, but no decision pronounced. The court declared that "it would be a reproach to the administration of justice, as said in *Bethia* v. *McKay*," if the plaintiff could withdraw the controversy, to be reopened in another suit, by dismissing his bill; and it cannot be allowed.

The English cases and the federal cases are collected on p. 42, *et seq.*, *infra*.

The Petitioners' Statement of their Main Proposition; and the Answer to it.

The petitioners put in the forefront of their brief (p. 17) their main proposition, viz:

1. That when the motion was made, if the plaintiffs had ceased to prosecute the case or had withdrawn, as they had the physical power to do, no decree could have been entered except a dismissal for want of prosecution, and that this would not bar a new suit.

2. That, if such be the case, they had a right to a dismissal which should leave the controversy untouched and ready for a new suit.

Both of these propositions are bad in law.

We shall presently (p. 53, *infra*) take up these propositions and answer them categorically by the authorities. It will, however, be more convenient to first present the authorities which both illustrate and control the case.

We propose now to examine more in detail the rules, authorities and precedents upon the precise question of

V. The Right of a Plaintiff in Equity to Dismiss his Case; when it Exists, and when it ceases to Exist.

It is clear that in the case at bar the plaintiffs wish to repudiate and escape the results of the trial begun and completed before the master, not because they are apprehensive that when his decision comes it will be adverse to them, but because it *has come*, has been formally communicated to them, and *is* adverse. They do not deny that a report by the master, duly filed in court, terminates the right to dismiss. They rest their asserted right upon the propositions (1) that nothing short of that will end their right, and (2) that the "draft report," which existed at the date of their motion, was a paper not known to the law, a mere tentative "chalk," and therefore may be treated as non-existent.

To this there are two answers:

1. Their proposition as to the "draft report" is not true in fact or in law.

It is a paper which the law *orders* the master to make and to communicate to the parties *as the expression of his matured conclusions;* and that is what, in terms, it did express. It is shown them simply to facilitate the proper preparation of necessary "exceptions", and to avoid unnecessary ones.

2. If their proposition were true, it would not help them. For the settled rule is, that *entering* upon the hearing or trial, and still more the submission of the case at the close of argument, cuts off the plaintiff's right to dismiss at pleasure as much as a final decision and the formal entry of it. The motion to dismiss was after all this.

3. It is also settled law that *a decretal order sending a case to a master*, upon any matter going towards the merits, terminates the right to dismiss, and gives to the *defendant* the new right to carry the case to a final decision and conclusion.

We proceed to establish these propositions.

The right alleged by the plaintiffs is asserted to arise out of and upon the following procedure:

Equity rule 83 directs that "the master, as soon as his report is ready, shall return the same into the clerk's office." Either party may file exceptions within a month; but if none are filed "the report stands confirmed on the next rule day," without the necessity of any consideration by the court.

CLIFFORD and LOWELL, JJ., in 1868, in *Union Sugar Refinery* v. *Mathiesson*, 3 Cliff. 146, examining at length the practice before a master, recognized and ordered that the long established English practice should be followed. This court had already approved the practice which they declared was both proper and established. They said p. (149):

"He hears them fully, and, when he has taken all the testimony, heard the parties, and *come to a conclusion*, he makes a draft of his report in the premises, and shows it to the parties, or files it in the clerk's office, and gives time for the parties respectively, if they see fit, to make their objections to the drafted report."

"The court will entertain no 'exceptions' unless founded upon 'objections' so taken before the master.

"Such has been the practice in this circuit as far back as the knowledge of the justices now holding the court extends.

"The court will require it to be followed unless in some very special cases."

The practice of showing the "draft report," as it is called, to the parties, arose upon an English Order in Chancery of October 29, 1683 (1 Sanders Ord. in Ch. 358). That order, reciting that frequently a master's report had to be recommitted because of oversights and errors of detail, ordered that he should *not* file it as soon as completed, but

"that every Master of this Court to whome any account is referred or other matter by any order upon the heareing of the cause when he hath *fully heard both parties and* PREPARED HIS REPORT shall at the request of either party give out

a sumons that both parties or *some for* them shall againe attend him whoe shall have liberty to peruse such his report, or take a coppy thereof. And that such person that is dissatisfied therewith doe in four daies next after such attendance bring in a noate in writeing of their exceptions thereto and take out a sumons to be heard thereupon. And then the said Master is to settle and finish his report as he shall finde just."

This draft report is not a "chalk" or tentative suggestion of the results which the master inclines to think he may reach after he has concluded his study. The English Order of 1683 which created it (and which, of course, is made part of our law by our rules) characterizes it by the phrase, *when the master "hath fully heard both parties and prepared his report."* The paper, in the eye of the law, expressed, to use the language of Judge CLIFFORD and the other authorities, the master's "conclusions." After it has been exhibited to the parties a rehearing cannot be had except upon grounds which govern applications for rehearings after a decision by a judge in chancery. *Thompson* v. *Lambe*, 7 Ves. 587; *Burgess* v. *Wilkinson*, 7 R. I. 31. It is for the purpose of affording the parties such an opportunity as is usually afforded in equity cases involving details, where, after the chancellor has filed his opinion, a hearing is had on settling the terms and details of the decree. The hearing before the master on "objections" is only for the purpose of correcting errors of detail which may often, by inadvertence, creep into a paper which deals with many details, as a master's report does. It is for the purpose of "settling the report and making objections" (*Remsen* v. *Remsen*, 2 Johns. Ch. 495, 502; confirmed in *Byington* v. *Wood*, 1 Paige, 145); and, therefore, while "exceptions" as to lesser matters will not be listened to unless the alleged errors were specifically brought to the master's attention by "objections" to the draft report, the actual practice is not to so cut off exceptions to the main conclusions which it is not expected that he would alter.

This is the substance of the original English order, and

the subject has been so expounded in the cases referred to, and also in *Story* v. *Livingston*, 13 Pet. 359, 366; *Hatch* v. *Indianapolis R. R.*, 9 Fed. Rep. 856 (GRESHAM, J.); *Celluloid Co.* v. *Cellonite Co.*, 40 Fed. Rep. 476 WALLACE, J.); *Jennings* v. *Dolan*, 29 Fed. Rep. 861 (WHEELER, J.); *Hoffman's Master in Chancery*, p. 69; *Maddock's Chancery Pr.*, Eng. ed., 1837, vol. ii, p. 680 *et seq.*; 2 *Daniell's Ch. Pr.* 5th Am. ed., pp. 1295, 1301, 1303, 1320; Eng. ed. 1837, p. 937 *et. seq.*; 2 *Foster's Fed. Pr.* 1127.

Doubtless the draft report, whether kept in the master's office or lodged in the clerk's office, as it may be in the first circuit (p. 24, *supra*) is not technically the *filed* report. So a written opinion of the court, or an oral opinion, directing a decree to be drawn and entered, is not a decree; but is nevertheless a *decision* which the plaintiff cannot convert into waste paper because he does not like it. *Rosenthal* v. *Coates*, p, 18, *supra*. The authorities are unanimous that a draft report is not an indiscreet or an unjudicial expression of the master's first impressions, like remarks which may fall from a judge during the argument, and which indicate a tentative inclination but exclude the idea that consideration has been completed and a decision reached. It is that legal, formal and *official* announcement of his *conclusion* which the *law* requires him to make; and requires him to present to the parties.

Nor must it be thought that the "draft report" is a mere paper *in pais*. The master has an "office" as well as the clerk of the court, so that what is there kept is a legal and judicial depository, and is a record, though not what is technically called the record of the suit. The master will order the parties to attend and peruse it, if they do not come voluntarily (text-books just cited).

The practice which thus prevails in England and in most courts of this country was here followed. The master filed his draft report in the clerk's office as the *Sugar Refinery*

Case allowed him to do. He might have kept it in his own office; and, upon stipulation of the parties, it was returned to his office and the case may be treated as if it had never left there. The plaintiffs recognized the practice not only by their stipulation (pp. 140, 122), but by their conduct. They moved, on affidavits, to reopen the case for further proofs and a rehearing on them (pp. 178–187.)* When this was denied they filed "objections" or exceptions (p. 187), which, properly, are expressed to be (p. 188, line 2) "by way of suggestion and exception to the draft of report submitted to counsel by the master." The defendants also filed "objections" as to some details, and each filed replies to the objections of the other, and both were heard thereon (p. 141). *Both parties then left the master's office to return there no more.* All hearings were concluded; *everything* was submitted. It was some weeks after this that the Western Union Company, plaintiff, on June 1, 1891, filed the first motion to dismiss.

We have stated the law and practice about master's reports somewhat fully, because the petitioners' entire case rests upon the proposition that the "draft report" is a paper which the law does not and cannot notice; whereas it is, as we have seen, the formal and official announcement of the master's "conclusions" which the law orders him to make and to publish. It therefore stands, *quoad* a master, in at least as high a position as an opinion of the court stands during the interval between the delivery of the opinion and the settling and entering of a decree.

There is another test of the legal character of the draft report. That which is a "chalk" or the expression of an inclination, cannot ripen into a decision by mere lapse of time; further judicial thought and consideration must be

* The petitioner's brief, pp. 7–8, reads as if there were *two* motions and *two* denials. In fact, there was one hearing on this matter and one decision (Rec., p. 136).

given to it. But a decision is none the less a decision because, upon a rehearing, the judge may modify his view. Now the "draft report," unless actively assailed by a party, as upon motion for rehearing or objections, will be filed in the clerk's office without further consideration by the master; unless *there* assailed by exceptions, it stands confirmed as of course on the next rule day; and where, as here, it covers the merits of the case, it will carry a decree unless actively opposed. In short, it stands substantively as a case does after an opinion on the merits has been filed.

It is a usual thing for the written and filed opinion of a judge to be followed by a hearing as to the details of the decree. The opinion itself may dispose of only the main features of the case, and, in terms, reserve much for examination by a master and further consideration by the court. Such a decree is not a *final* decree, but *it expresses a decision, and ends the plaintiff's right to dismiss.* In *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702, precisely such an interlocutory decree had been made, reserving some questions for further inquiry. The plaintiff then asked leave to dismiss. The circuit court refused it, and this court decided that the refusal was right.

The petitioners endeavor to create an impression that the master's mind was, in fact, hanging in the wind up to the time of his filed report of August 21, 1891. Nothing of the sort. The comparison of the "draft report" of February and the filed report of August, spread out in the petitioners' brief, pp. 10–11, show that in the latter the master did not alter a single conclusion, and no one expected him to; he simply made those additions of *detail* which the English Order in Chancery contemplates.

The matters pointed out by that brief as variations are the following:

A large number of "contracts" were put in evidence. The complainants, by exception 7, p. 189, asked the master to state that a particular word was not used in "contracts"

made by the defendant before a certain date. This, of course, was a mere matter of inspection. The master stated it in his filed report.

The draft report states that the defendants contended that the course of business and the correspondence of the parties might be resorted to, to ascertain the meaning of words and phrases descriptive of the business, p. 149 (5); and that the master found that the authorities cited justified this (p. 150, third paragraph). The plaintiffs' "exceptions" 1, 3, p. 188, insisted that this evidence was incompetent. In response to this objection the defendant contended that the *complainants* themselves had introduced and read in evidence the bulk of these papers without objection; whereupon the master's filed report stated this contention and referred to the shorthand report of the argument for proof of the fact, and annexed that report (p. 135, *ad fin.*).

The order of reference directed the master to report "such part of the testimony as either party shall request." His "draft report" annexed the evidence proper taken in the cause and printed, and a schedule of documents introduced before him but not printed (p. 154). The complainants, by "exception" 28, p. 196, asked him to report all the evidence, and he did so. The filed report says (p. 135):

"The complainants ask to have the evidence reported, and the defendant considers that certain statements made in argument are important. I return herewith the evidence in the case, in three printed volumes, viz.: . . . Also exhibits (here follows a list of forty-three documents) . . .

"The arguments in typewriting are returned in five volumes."

The petitioners' brief says (p. 12) that the other differences between the reports "are, perhaps, not so material as these."

It would be impossible to more clearly show that parties and master appreciated and conformed to the true meaning and intent of the practice initiated by the English Order of

1686; viz., that the "draft report" presents the conclusions of the master, and is shown to the parties merely to enable oversights and omissions as to details to be corrected. Indeed the orders which the master is empowered to issue to the parties at this stage calls upon them to attend to "settle" his report; — exactly the phrase which is commonly used (settle the terms of a decree) to express what takes place after a decision by a chancellor in a case involving details.*

We now recur to the question, *When a complainant's right to dismiss without prejudice exists, and when it ceases to exist.*

Undoubtedly the day after a bill is filed, the plaintiff may have it dismissed, and such dismissal leaves the controversy unaffected if a new suit be brought. It is not disputed, however, that the time arrives in the progress of a case when the *right* of the complainant to have the proceedings count for nothing ceases, and a decree of "bill dismissed," without qualification, will bar a new suit. The court where a second suit is brought will determine for itself whether that point had been reached, and a plaintiff who submits to such a decree runs the risk of what that second court may decide as to its effect.

But the court where the original suit is pending has also some power in the premises. If it finds that, through defect of pleading or want of jurisdiction or otherwise, the merits of the controversy cannot be adjudged, or cannot be fairly and satisfactorily adjudged, it may, in an action at law, authorize

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* The petitioners' brief (p. 10) says that the "draft report" was not communicated to the parties except by filing the same with the clerk." This would be enough, but it is evident that the parties were at the same time notified that it had been filed, for *on the next day*, they agreed that it should be returned to the master's office (p. 122).

In their "exceptions" the plaintiffs refer to it as "the draft of report *submitted to counsel* by the master" (p. 188, top).

a non-suit, or in equity a decree of dismissal "without prejudice." Such a judgment or decree is not only a dismissal, but is an adjudication that it shall not operate as a bar to a new suit; and all subsequent courts *must* so accept it. The difference between a bare dismissal and a dismissal "without prejudice" is very material, and the plaintiff cannot have what is, in effect, leave to bring a new suit unless he shows himself entitled to it. *Gaylords* v. *Kelshaw*, 1 Wall. 81; *Barney* v. *Baltimore*, 6 Wall. 280; *Durant* v. *Essex Co.*, 7 Wall. 107, 101 U. S. 555; *Kendig* v. *Dean*, 97 U. S. 423.

In ancient times, when the power of amendment was very limited, the court would allow a non-suit if it found the pleadings to be such that the plaintiff could not prove his real case under them. Such are the authorities from *Strange* and *Sanders*, etc., cited in the petitioners' brief, and collected in *Stevens* v. *R. R.*, 4 Fed. R. 97, 100. Occasionally in equity also the court will find that a case has become so complicated by a series of errors that it is better to have a new suit brought than to patch up the old one.* But such authorities have no bearing upon this case, which is rested upon an absolute power in the plaintiff to dismiss at his own pleasure and without cause shown.

There comes a time when the right of the plaintiff to withdraw the controversy from the court, and to obliterate the proceedings so that they shall not bar a new suit, ceases; or to state it otherwise, there comes a time when *the defendant has acquired a right* to have the suit terminated by nothing short of a decree which shall also terminate the controversy by barring a new suit. Now, the authorities which fix and define that period show that it had been passed be-

*In Massachusetts, also, it is not uncommon to take a case from the jury and submit the questions of law to the full court under an agreement for a non-suit if the court find the law adverse to the plaintiff. But such cases rest upon the *agreement*. *Homer* v. *Brown*, 16 How. 354, presented such a case.

fore June 1, 1891, the date of the first suggestion of or attempt to make the motion in controversy.

If the case has reached a point where a decree of dismissal, *not* expressed to be without prejudice, would bar a new suit, the plaintiff's *right* to have a dismissal "without prejudice" at *his* pleasure and without cause shown, has of course ceased. It is also settled by the authorities, and is expressed in the Rules, that a point exists where the *defendant* has acquired a right to carry the case to final decree in spite of the plaintiff's resistance. If we find a point where this right of the *defendant* is clearly established, we shall have found a point where the previous and antagonistic right of the plaintiff has ceased.

The authorities show, as must be the case, that this point can be defined in another way. The power of the plaintiff to dismiss without prejudice, at pleasure (quite different from the power of the *court* to dismiss without prejudice, for cause shown), *is founded upon his power to physically absent himself.* If the case cannot proceed in his absence, it must stop; the petitioners themselves have so formulated the rule in their brief, p. 17, quoted p. 54, *infra*. But if in spite of his absence the cause can proceed, then he cannot stop it.

The old strict common law rule was that the court had no *power* to receive a verdict in the absence of the plaintiff, and no power to compel the plaintiff to appear and listen to it. If, therefore, the plaintiff walked out of the court room by one door when the jury returned with their verdict by another, the case must stop. This gave plaintiff the *power* to compel a non-suit at any time before verdict.

3 *Bl. Com.* 376. "If the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *non-suit*, *non sequitur clamorem suum*. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily non-suited, or withdraw himself."

This was the law in Pennsylvania until it was changed by statute of 1814: *M'Credy* v. *Fey*, 7 Watts. 496.

This is still the law in Michigan: *Merchants' Bank* v. *Schulenberg*, 54 Mich. 49; and in the sixth circuit *by an express rule*. *Holcomb* v. *Holcomb*, 23 Fed. R. 781. But this practice was such a mockery of justice that the courts of New England, accepting the common law only so far as it was consonant to our civilization, have always declined to permit it (cases on p. 21 *supra*). It is therefore not the rule in the first circuit (*Folger* v. *The Robert G. Shaw*, infra). But obviously this common-law technicality has no application in equity.

VI. THE CASE AT BAR HAD REACHED THE POINT WHERE A SIMPLE DECREE OF DISMISSAL WOULD BAR A NEW SUIT; AND AT THAT POINT THE RIGHT TO DISMISS "*WITHOUT PREJUDICE*" CEASES.

The petitioners agree that their right ceases when a decree or decretal order has been made, or when the defendant "hath acquired a new right"; and this is true. The latter phrase means, plainly, when, by the progress of the cause, the defendant has in some way acquired a right to have it carried to conclusion; a right which he did not possess at the outset of the suit. Now our case comes within the clear meaning of both of those phrases. But it will be simpler to find exactly what points in a cause have been held to terminate the plaintiffs' right to dismiss without prejudice, at pleasure.

The American authorities, at least, are clear and uniform that when the materials for decision have been furnished to the court, and still more when the court has taken *any* steps in the cause towards an ascertainment of the merits, a bare decree of dismissal bars a new suit.

Thus in *Rosse* v. *Rust*, 4 Johns. Ch. 300 (1820), it was held that a bill dismissed for non-appearance, *when no evidence had been taken*, is, by reason of that latter fact, no bar to a new suit. But *Ogsbury* v. *La Farge*, 2 Comstock, 113 (1848), decided that if evidence has been taken and published so that the cause is *ripe* for hearing, though no hear-

ing has taken place, a dismissal is a bar. That that rule is settled in New York is peculiarly important here. For it is not unreasonable to suppose that if the plaintiffs, New York corporations, had the right to bring a new suit, they might commence it in the state court of New York, by attachment of property found there; and this explains their eagerness for a dismissal "without prejudice."

The law thus announced in New York is the same elsewhere.

Folger v. *The Robert G. Shaw*, 2 Woodb. & M. 531 (1847, WOODBURY, J.), p. 47, *infra*.

Badger v. *Badger*, 1 Cliff. 237 (1859, CLIFFORD, J.), p. 49, *infra*.

Borrowscale v. *Tuttle*, 5 Allen, 377, p. 53, *infra*.

And other cases *infra*.

The English authorities are substantially to the same effect.

VII. THE COURTS ALSO HAVE REPEATEDLY, IN THIS COUNTRY AND IN ENGLAND, LAID DOWN THE RULE THAT THERE IS A POINT WHERE, THOUGH THE CASE HAS NOT BEEN DECIDED, A RIGHT HAS ACCRUED TO THE *DEFENDANT* TO *HAVE IT RETAINED AND CARRIED TO A DECISION.*

Thus the question is not merely whether there has been a final *decision*, nor even whether there has been a partial or inchoate decision; but also whether the court has not the power to retain the cause in order to give effect to such decision, complete or partial, as has been made, or to make or complete a decision on the materials furnished, if no decision has been made. For one of the "new rights" which the defendant does not have on the day of appearance, but which accrues to him by virtue of the progress of the suit, is *the right to carry it to a conclusion.*

Two definitions of the critical point have been established, which are particularly important:

(*a*) A decretal order sending a case to a master to find facts terminates the plaintiff's right to dismiss "without prejudice."

This is established by an uninterrupted series of decisions. It is also the necessary and recognized result of our Rules. For Rules 74, 75, provide that when a case has once been sent to a master, the *defendant* can carry the cause to final report in spite of the plaintiff; and Rule 83 enables the defendant to carry the case to decree after the filing of the report, in spite of the plaintiff. The history of those Rules also shows that they were made for this purpose; and they would be nullified if the plaintiff had the right now claimed (*v.* p. 10, *supra*).

(*b*) It is settled law that *the beginning of a hearing* gives to the tribunal the power, and to the defendant the right, to carry it to a conclusion and a decision, in spite of the plaintiff. Now, before the motion to dismiss, both parties had not only begun the hearing before the master, but they had completed the main hearing on the merits; they had completed the hearings on the motion for leave to take additional proof, and on the objections to the master's report; and had actually and finally submitted everything to the master, and departed from his office for the last time. The master therefore had a right to complete all the formalities of his work by filing a final report, and was bound to do so.*

* Upon filing the motion to dismiss of June 1, 1891 (p. 122), the complainants' counsel asked the master to suspend proceedings, which of course he did not do. For Rule 75 requires the master to proceed promptly, and Rule 83 orders that "the master, as soon as his report is ready, *shall* return the same into the clerk's office." The master says that he considered it his duty to proceed, and therefore did it (p. 136).

The following are the leading authorities on these two points:

(*a*) *A Reference to a Master, by an Order of Court, terminates the Plaintiff's right to Dismiss without Prejudice.*

It is not, we suppose, doubted that when the court, upon a hearing of the cause, finds some essential matter in favor of the plaintiff, and sends the case to a master for inquiries which are essential before a decree can be made, it has *laid hold of the case* and has made a "*decretal order*" which terminates the plaintiff's right to dismiss without prejudice. But the same result follows from an order of reference *by consent*.

This has been repeatedly decided in England, especially in two classes of cases.

Upon the bill for specific performance of a contract to sell or purchase land, the first question is whether a valid and subsisting contract exists. The practice was that the case should stand for hearing before the chancellor for him to determine this; and if he determined it for the plaintiff, either upon admissions or after a contest, then the case was sent to a master to inquire whether the seller could make a good title. Now in many cases the defendant, by answer or otherwise, conceded all this at the outset, and then the practice grew up of at once ordering the reference by consent, without waiting for the case to be reached for hearing.

So in partnership cases. The first question was whether there had been a partnership, and, subsequently, facts giving a right to an account. Then came the inquiry what ought to be accounted for.

These cases are exactly parallel to ours, where the plaintiff must make out (1) that the indenture was duly executed and was a valid contract; (2) that the American Bell Telephone Company, sole defendant, and not a party to that contract nor even in existence when it was made, has subsequently assumed its obligation and is bound to account for whatever

ought to be accounted for under it. When this was admitted by our answer, then the case was sent to a master by a consent decree that he might make the inquiry which next arose. Or, to state it otherwise, the interlocutory decree, read in the light of the pleadings, established a general obligation to account under the contract, and referred to the master the question what, if anything, ought to be accounted for beyond the accounts already made. This is like the partnership cases.*

The following are the principal cases on these topics:

Biscoe v. *Brett*, 2 Ves. & Beame, 377 [ELDON, L. C., 1814]. The case had gone to a master by a consent decree; *before report* the plaintiff undertook to dismiss. It was decided that he could not do this. Lord ELDON said:

"A more mischievous practice [a reference ordered by consent without a previous hearing] never was introduced, if that order is not to have all the effect of a decretal order: and *I desire it to be clearly understood, that, whenever such an interlocutory order has been made, the plaintiff shall not turn round, and dismiss his bill as of course;* but shall be considered in the same situation as if a decree to that effect had been made *on the hearing of the cause*."

Mocher v. *Reed*, 1 Ball and Beatty, 320 [1810]. The case was sent to a master to take an account, and when the testimony before him was nearly concluded, the plaintiff entered an order dismissing the bill, preferring to proceed at law because he thought it more advantageous to examine the witnesses before a jury. The rule was that he could not sue at law except by withdrawing his bill. The question, therefore, was whether he had a *right to dismiss while the case was on trial before a master*. It was decided that he could not do this. The L. C. said:

* It was especially agreed on the record that no account need actually be taken until it had been ascertained finally whether there was anything to be accounted for.

"I never heard that after a decree had been pronounced, whereby *the subject of the cause had been attached in this court*, that the plaintiff has been permitted to proceed at law for the same matter; particularly without making any application to the court."

Bluck v. *Colnaghi*, 9 Simons, 411 [1838; SHADWELL, V. C.]:

"This was a suit for winding up the affairs of a partnership between the plaintiff and defendant.

"By *consent*, an order had been made, on motion, for taking the accounts of the partnership; but the order had not been drawn up.

"Defendant now moved to dismiss the bill for want of prosecution.

"The V. C. said that the order which had been pronounced, was a decretal order; and though it had not been drawn up, yet *either party was at liberty to draw it up;* that an *order in the nature of a decree*, having been made in the cause, the bill could not be dismissed."

In these cases the court laid down the rule that when a case was sent to a master *both* parties became actors; so that the plaintiff no longer controlled the case. Observe that distinctly in *Biscoe* v. *Brett*, the *defendant* sought no relief, and could not have any. He simply denied the plaintiff's claim. That case cannot be distinguished from ours in this respect; nor can its authority be escaped.

Collins v. *Greaves*, 5 Hare, 596 [WIGRAM, V. C., 1847], affirmed this rule. Pending a reference as to title the defendant moved to dismiss because the plaintiff did not proceed. "The V. C. said that the pendency of the order of reference was an answer to the motion. *Either* party might procure a report." S. P. *Gregory* v. *Spencer*, 11 Beav. 143.

Roberts v. *Williams*, 2 Hare, 151. Either party may move to have the report confirmed.*

* Our Rule 83 goes further: the report *stands* confirmed, as of course, on the next rule day unless actively assailed.

So, in the United States, an order of reference terminates the right to dismiss.

Bray v. *English*, 1 Conn. 498 [1815]. Reference by rule of court. The referees notified plaintiffs of the time set for the hearing, and as plaintiffs did not appear, proceeded *ex parte*.

P. 501. "When a submission is made by rule of court, it is irrevocable; for the object is to place the parties in a situation that *either may compel the other* to make a final settlement of the dispute.

Seymour v. *Jerome*, Walker (Mich.) 356 [1844]. Bill to settle partnership accounts; a reference to the master *by consent;* and for that reason a subsequent motion by the plaintiff for leave to dismiss was refused.

MANNING, Ch. "The interlocutory order or decree was entered by consent of parties. It admits the partnership and the right of complainant to an account of the partnership dealings. To that extent it is an adjudication on the rights of the parties. A complainant may, at any time before there has been *an interlocutory* or final decree in a cause, dismiss his bill of course, on the payment of costs. This is the general rule, but the present application does not come within it."*

". . . It is true, where a plaintiff is before a court of law, he can withdraw his suit at pleasure, and commence a new action; *but by his submission by rule of court, he has waived this privilege*, and has given an irrevocable power to the referees to decide the question."

Dexter v. *Young*, 40 N. H. 130 [1860]. For good cause shown, courts will rescind a rule to refer, but to allow to either party the power to do this "at the caprice of either party," "of his own mere motion . . . could not be countenanced or tolerated."

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* The petitioners quote this case as good law on pp. 49–50 of their brief, but their quotation reads: "The interlocutory order admits the partnership," etc., so that the court, in reading their brief, would not be aware that *the very point of the decision was that a reference by consent barred the right to dismiss as much as a reference after a hearing.*

The Massachusetts cases are on p. 21, *supra*.

Our Equity Rules recognize and enforce this right of the defendant to carry the case to final decree after a reference to a master.

One grievous wrong in the old equity practice in England was that at many stages of a suit, if the plaintiff did not move in the case, the defendant had no remedy except to have it dismissed for want of prosecution; which did not hasten the end of litigation, for the plaintiff would then bring a new suit. At a very early time this was helped by rules under which the defendant, at least after a reference to a master, had the power to carry the case to a conclusion.

Our Rule 29 of 1822 gave the *defendant* a *right* to carry on the case *ex parte*, if the plaintiff refused to appear. About this time, or soon afterwards, came the English agitation for equity reforms, aimed especially against the power to prolong litigation which plaintiffs formerly had. The Supreme Court felt this, and our Rules of 1842 have twelve (73–84) intended to carry the case to a conclusion in despite of the plaintiff, as follows:

Rule 74. When a reference has been made, if the plaintiff does not initiate the proceedings before the next rule day "the **adverse** party shall be at liberty forthwith to cause proceedings to be had before the master."

Rule 75. "If **either** party shall fail to appear" the master may proceed *ex parte*. Thus from the moment of a reference the **defendant** has a **right** to carry the case to report.

Next he has the right to carry the report to final decree. *Rule* 83: "The master, as soon as his report is ready, **shall** return the same into the clerk's office." If no exceptions are filed within a month "the report **shall** stand confirmed on the next rule day. If exceptions are filed they **shall** stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting."

The whole purpose of these provisions was to give to the **defendant**, the moment the case has been **sent** to a master, the clear and effective right to push it to final hearing against the resistance of the plaintiff; that is, not merely to get the

benefit of a report after it has been made, but to insist that one shall be made. And after it has been made, it goes of itself to final decree, unless affirmatively assailed and overthrown.

Of course the plaintiff cannot have an absolute right to nullify these rules by a dismissal at pleasure. The courts have, in substance, so expressly decided (*v. infra*).

Thus the English practice that a reference to a master terminated the right to dismiss, and gave the defendant the power to carry the case to a conclusion, was adopted by our Equity Rules of 1842 (1) by expressly giving to the defendant the same or greater power in this respect than the power which in England had been decided to control the question; (2) by adopting the existing English practice, if these rules did not already adopt it.

(*b.*) *The* **beginning** *of a hearing stops the plaintiff's right to dismiss at pleasure, as much as a decision made and recorded with the fullest formalities.*

There are three easily ascertained periods in a cause:

1. When the evidence has been completed so that all the materials for judgment are in the possession of the court;

2. When the cause is set for hearing or called for hearing;

3. When the hearing actually begins.

The American authorities are unanimous that when the case is ripe for hearing a simple decree of dismissal bars a new suit, and that therefore that the right of the plaintiff to dismiss without prejudice then ceases (pp. 33–4, *supra;* p. 47 *et seq. infra*).

The English authorities which existed at the date of our rules (1842), *all* agreed that the *beginning of the hearing* terminated the right; most of them agreed that the right ended when the evidence was completed and the case ready and *set for hearing;* that is, when the materials for decision were in

court ready to be handed to the judge. One or two of them held that the right ceased only when they were actually handed to the judge; that is, when the hearing began. That was the only difference among the English cases. Now our case had passed the latest of these periods.

The English Order of 1845, has been referred to by the petitioners (petitioners' brief, pp. 20–1) as if it for the *first* time terminated the right; and it is thereupon argued that if the right to dismiss was terminated in England only by an order made after the date of our rules, it was not adopted by our rules. But this is not the case. For, as the authorities just referred to show, *the English law that there could be no dismissal* after hearing begun, *except by a decree which concluded the merits and barred a new suit, did not rest on the English Orders of 1845*, but was established by a unanimous series of decisions before 1842, and therefore was adopted by our Rule 90. What the English Order of 1845 did, was to solve the doubt between that date and a still earlier date by selecting the earlier one. The later, however, is sufficient for our case.

The applicability of this to our case, of course, is that whatever the *completion* of the master's work could effect — and it is admitted that a filed report by him would terminate the right — is equally effected by *beginning* the hearing before him, and of course still more by its completion.

Plainly, the wholesome meaning of this rule is that when once both parties have actually placed the case and the proofs in the hands of a tribunal for its decision, the tribunal has possession of the cause, and neither one has the right to withdraw it.

The English Cases on these Topics.

Pickett v. *Loggon*, 14 Ves. 215, 232 [1807]. A bill came on to be heard on the evidence. No counsel appeared for the plaintiff and the bill was dismissed with costs.

A new bill was filed, and the question was whether the

former decree was a bar. The case went off on the ground that the answer did not set up the bar, but Lord ELDON said:

. . . "if a party thinks proper to bring his cause to a hearing, upon examination of witnesses, publication passed, and the cause capable of being opened, and then makes default, it is very difficult, and would be rather *mischievous*, to treat such conduct merely as a non-suit at law."

Then he expatiated at some length upon the inconvenience and injustice of permitting such a practice.

Observe that there the hearing had not been opened; nobody ever doubted the effect of *that*. The question was whether *calling for hearing* ended the right to dismiss without prejudice.

Booth v. *Leycester*, 1 Keen, 247 [1836]. The facts are complicated, but the question was whether W. H. P. had a right to dismiss his cross-bill as of course, and without cause shown upon special motion, after it had been set for hearing but before the case had been actually called.

"The Registrar in Court, having been referred to, was of opinion that the cross cause having been *set down to be heard* with the original cause, the plaintiff in the cross cause could not regularly obtain an order, as of course, to dismiss his bill, but that the motion for that purpose ought to have been special."

At the argument the objector contended

"that the plaintiff in the cross-bill could not, *after the causes had been set down for hearing*, and it had been agreed that evidence in one cause should be read in the other, deprive the plaintiff in the original cause of the benefit of the matter put in issue in the two suits; that no authority had been cited which applied to the present case, and that the opinion of the most experienced officers of the court was that the order was irregular."

M. R. "His lordship had a strong impression, at first, that a plaintiff might dismiss his own cause, upon payment of costs, at any time; *but, upon inquiring into the practice, he found the rule to be otherwise*, and it was certainly reasonable

that a plaintiff ought not to have the power of dismissing his bill, when by so doing he might prejudice the defendant."

His lordship was of opinion that the "application to dismiss the bill ought to have been made specially, *i. e.*, upon cause shown. That is, *setting down for hearing* ends the right to dismiss.

2 *Maddock Ch. Pr.*, 509, 3d Ed., quotes from the MS. case of *Mill* v. *Green*, the decision of CLARKE, B., that

"a plaintiff ought not to move, as of course, to dismiss his own bill *after the case is set down*, . . . because the defendant has a *right* to a hearing, and to have the bill dismissed on the merits."

The author adds, "There seems to be much force in this reasoning. A contrary practice might lead to great oppression."

Booth v. *Leycester* shows that according to the most experienced officers of the court such had always been the practice.

Curtis v. *Lloyd*, 4 Mylne & Craig, 194 [1838; COTTENHAM, L. C.]. The cause was called for hearing but went over until the next day for the convenience of plaintiff's counsel. On the next day, and before it was called, the plaintiff entered an order as of course, dismissing the bill. A contention at once arose as to whether this was a dismissal before the case was called; this contention was obviously a recognition that calling the cause for hearing was generally considered the critical point. The Lord Chancellor said that the case had been called on the first day, and refused to allow a postponement for convenience of counsel to affect the rights of parties.

For the plaintiff it had been insisted that, "in accordance with the practice, a plaintiff might, at any time before decree, and at all events, up to and at the time when his cause was called for hearing, obtain the common order dismissing his bill, with costs," citing a MS. entry.

"L. C. I was not aware that the doctrine had been carried to the extent to which Lord Hardwicke seems to carry it in *Carrington* v. *Holly:* but I cannot see why a plaintiff should be in a worse situation, because he informs the court that he does not intend to proceed with the hearing of his cause, *than if he made default.* In principle it is substantially the same thing." Motion allowed.

That is to say, the *right of the plaintiff to dismiss is co-extensive with his right to stop the case by walking out of court;* and that right ceases, the L. C. thought, not when the case is reached, but when the hearing has actually begun.

This states the latest period at which any English authority sanctions a dismissal as of course. Our case at bar had long passed it. The only dispute left in the English courts was as to which of the two dates — *calling* for hearing or *beginning* the hearing — should be accepted as the criterion; and the Orders of 1842, in accordance with the weight of English authorities, and with modern tendencies, fixed the earlier date (p. 42, *supra*).

Cooper v. *Lewis*, 2 Phil. Ch. 178 [1847; COTTENHAM, LC.]* A general demurrer had been overruled on argument, and the defendant had presented a petition of appeal. The plaintiff then entered an order to dismiss his bill as of right.

Observe, that the defendant had not obtained by the progress of the cause a new right in the sense of a right to enforce a counter claim; nor had he got a decision in his favor. But he had reached a point where, the merits having been once discussed (for a general demurrer usually brings up a question of law on which the controversy will or may turn), he was in a position to speedily have the matter ended by a decision of the appellate court. The question,

*This case was after our Rules of 1842; but by *Thomson* v. *Wooster*, 114 U. S. 112, note, it is useful to show what the earlier practice was.

therefore, was whether the defendant had a *right to carry the case to final conclusion*, or whether the plaintiff, if he thought his chances better in another suit, had a right to strike out what had been done and begin again.

The decision was that the defendant had a right to have the case carried to final decree.

"The Lord Chancellor inquired whether there was any case in which a bill had been dismissed by an order of course, after a decree or anything *in the nature* of an adjudication."

Reply, — reference to *Carrington* v. *Holly*, 1 Dick. 280, and *Curtis* v. *Lloyd*, 4 Myl. and Cr. 194.

"L. C. In the case in Dickens, Lord Hardwicke proceeded expressly upon the ground that there had been no determination; the order directing the issue being treated as merely prefatory. Here there has been an adjudication, from which the defendant might appeal, and has appealed. Now, the adjudication of the court of appeal, is, in effect, an adjudication of the date of the *hearing* below; and such an adjudication, if it should be in the defendant's favour, would be a very different thing to him from your dismissing your bill."

The L. C. said that a particular impropriety of which the plaintiff had been guilty justified discharging the order. "But I think upon the more general ground which has now been argued, the order was wrong in substance."

The order should not have been granted without a consideration of the particular facts by the court, *i. e.*, not as of right. But the L. C. also expressed his opinion as follows:

"The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position in which he would have stood if the suit had not been instituted; but that is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff. The defendant here had a right to appeal from the order on the demurrer: and if he succeeded he would have his costs back and an *adjudication of the court upon the merits. That right he loses*, if the plaintiff is entitled to dismiss his bill as of course."

Cases in the Federal Courts.

Folger v. *The Robert G. Shaw*, 2 Woodb. & M. 531 [1847; WOODBURY, J.] covers the subject. The case was settled before the opinion was actually delivered. But the opinion was filed at the suggestion of two of the leaders of the bar, and was intended to both collect the law on the subject, and *establish the practice on the subject for the first circuit.* It therefore has the effect of a *Rule* (p. 11, *supra*), and the practice therein announced is, we submit, conclusive upon all cases arising in that circuit.

The court distinguished carefully between a decision allowing dismissal of an action as of right, and a permission granted in the exercise of judicial discretion upon special cause shown, and held that considerations which might justify a special favor have no bearing on a motion which insists upon it as of right.

The court's conclusion was that when the case had been carried so far that the materials for a decision had been brought into it and actually submitted to the tribunal for its consideration, the defendant had a **right** to have the court make its conclusions and carry them into effect by completing the proceedings to a final decree, which would prevent a new suit; and it pointed out that the authorities, both at law and in equity, had shown a continually increasing disposition to insure this result, as courts became more and more alive to the importance of terminating controversies when once they had been put in possession of the means for doing so. Therefore, when the case had reached that point, the complainant's voluntary absence did not work a discontinuance, but the cause proceeded to final judgment with the same effect as if he were present.

The following are quotations from the opinion:

P. 534. "I have assumed as the guiding principle, it being the only one conceivable by me, that the precise stage, in which the discontinuance should be allowed without a judg-

ment on the merits, and as a matter of right if claimed by the prosecuting party, is any progress in the cause, which has not yet *furnished means* to the Court for a correct final decision.

The right to dismiss ceases "where the action has reached such a stage, that the defendant cannot be obliged by the plaintiff to let the latter go out of Court without some final judgment on the matter itself, which is in dispute. . . .

"That is the precise question here; when that stage must be considered as reached?

"The rules of practice do not seem to be entirely uniform on this point, and **have become more rigid in modern times than anciently.** But I apprehend that the principle which must govern it is that before indicated, and which is, that this act must be done at some period before the merits can be ascertained for a final judgment, or the plaintiff is not entitled to do it as a right."

The opinion then states the ancient law as to non-suits as on p. 18, *supra*, and continues:

"But this practice held out too great an encouragement to repeated and vexatious suits, and **gave an advantage to a plaintiff which the defendant did not enjoy, of a prolonged litigation, and new and various experiments and trials.** In the hands of wealth and power, exercised against moderate means, it would be likely in time to break down any antagonist."

And, therefore, it was abolished in England as far back 2 as Hen. 4.

P. 538. "The readiness for the trial, the call of the case, the expiration of the notice, and the introduction of any pertinent evidence, is, as before intimated, the true *punctum temporis* when the *right* of the plaintiff to become non-suit ceases, and that *of the defendant* begins for a final judgment; because, then, the parties have agreed in Court, that final proceedings shall be had, then there is a presumed readiness for them, then they have begun, and means are before the Court to settle the merits."

"The true test seems to be the progress in the case so that the court have means to decide on the merits. **The defendant then has rights, and may well insist on a final judgment to avoid further expense and litigation.**"

That practice has never been departed from or questioned, and is **the law of the first circuit.**

Badger vs. *Badger*, 1 Cliff. 237 [1859; CLIFFORD, J.]. A prior suit had been dismissed *before* the time for taking testimony had elapsed and *before* "publication" had passed. The case, therefore, was not ready for submission. The decision was that the decree was not a bar for that reason. Judge Clifford laid down no rule as to the exact moment when the right to dismiss ceased, but stated that the question, and the only question, in England was whether the *call* for hearing or the *beginning* of the hearing ended.

Stevens v. *R. R.*, 4 Fed. R. 97 [1880; HAMMOND, J.] examined the subject at great length. The decision was that the right to dismiss without prejudice ceased when "everything is ready for the hearing." The court also said (p. 107):

"The case of *Booth* v. *Leycester* is conclusive against the position that the right protected by this exception must arise out of some order or decree entered in the case. *It may arise out of any proceeding in it, and may be found in the nature of the defence, the condition of the pleadings, the agreement of the parties, or any circumstances appearing of record in the case which show that it would be inequitable to allow the dismissal.*"

Electric Accumulator Co. v. *Brush Electric Co.*, 44 Fed. R. 602. A motion to dismiss, made just before the proofs were completed, was denied by Mr. Justice BROWN. The court said (p. 604):

"While there is no doubt of the general proposition that a plaintiff in an equity suit may dismiss his bill at any time before the hearing, it is equally well settled that he cannot do so without an order of court,—*a practice which implies a certain discretion on the part of the court to refuse such order if, under the particular facts of the case, a dismissal would be prejudicial to the rights of the defendant.*"

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* In those days, in the first circuit the evidence was taken secretly upon filed interrogatories, and was kept sealed until the court made an order for "publication."

He cited *Stevens* v. *R. R.* as "a most satisfactory opinion of Judge Hammond," reviewed the cases briefly, and concluded (p. 605):

"Upon a full examination of all the cases upon this subject we have come to the conclusion that leave to dismiss a bill should not be granted where, beyond the incidental annoyances of a second litigation upon the same subject-matter, such action would be manifestly prejudicial to the defendant."

It is not merely the cost or "the incidental annoyances of litigation" that *we* are asked to encounter afresh. The tribunal had formally announced its conclusions in our favor. *It is because that fact infinitely outweighs in importance the cost of a new suit, that the Western Union Company want to dismiss their bill.*

Hershberger v. *Blewett*, 55 Fed. R. 170 [1892; HANFORD, J.]

"The defendants have been put to expense in making their defences, and, in my opinion, they are now entitled to secure by a final decree the fruits of the litigation. The motion to dismiss without prejudice I regard as a request to the court for its consent to the use of judicial process for the mere purpose of harassing and oppressing the defendants. To grant the motion, the court will have to make a record which will be equivalent to a public announcement that the plaintiffs have leave to renew in this court the attack upon the title to the premises, and a warning to every person who buys or improves a lot in said addition that the expense of defending against such attack may be forced upon him or her whenever the plaintiffs shall be so minded." . . . "The controversy between the parties has been practically ended by the interlocutory decrees upon the demurrers and exceptions to the answers. It is my opinion that the defendants are now entitled to have the cause set down for hearing upon the bill and answer, unless the court shall for good cause grant an application to enlarge the time for taking evidence according to the rules. *Foster's Fed. Pr.*, Sect. 292. Motion denied."

City of Detroit v. *Detroit City Ry.*, 55 Fed. R. 569 [1893; TAFT & SWAN, JJ.]. The case had been set for hearing. Then the plaintiff moved to dismiss without prejudice, thinking that the views of the state court, where it intended to bring its new suit, would be more favorable to it. The court said:

"While it may not be usual to have so candid an avowal of the fact made, the federal courts are frequently compelled to administer justice in cases where one of the parties would prefer another forum. . . . As against the right of one party, the preference of another has not usually been regarded of weight. It may not be pleasant to administer justice under such circumstances, but, as we cannot consult the preference of a party, so we cannot consult our own, where our jurisdiction is rightfully invoked. We can only assure ourselves that the attitude of the parties with respect to this court does not in any way affect our earnest wish to reach the truth, and decide this case as equity and law may require."

Then addressing itself to the legal question it said:

"It seems hardly fair that after a case has been got ready for hearing, and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of the benefit of all that preparation by a dismissal, under which he reserves full power to harass him by bringing a new bill when he shall choose to do so, on the simple condition that he pay the costs, which are so notoriously inadequate to compensate defendant for his actual expenditures."

Chicago & Alton R. R. et al. v. *Union Rolling Mill Co.*, 109 U. S. 702. In this case, to which we have already referred (p. 28, *supra*) the court had passed upon a part of the case and reserved the rest for further inquiry. All that could be said about it was that the judge had reached and had expressed a conclusion on the main merits. This was, so far, a substantial victory for the rolling mill, and in natural course would lead to a decree in favor of the rolling mill, unless the judge could be induced to change his mind. Therefore the plaintiff cannot dismiss. Now the draft report of a master expresses as much as that.

This court said (p. 713):

"The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

"It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, **or such proceedings have been taken as entitle the defendant to a decree,** the complainant will not be allowed to dismiss his bill without the consent of the defendant.

"The rule is stated as follows in Daniell's Chancery Practice, page 793, 5th Am. Ed:

"'After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.'

"The same writer, page 794, says, that,

"'After a decree has been made, of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill.'

"The rule, as we have stated it, is sustained by many adjudicated cases."

This court then quoted or cited most of the cases on this topic before 1883 which were referred to in the opinion below in the case at bar and in this brief. It affirmed the refusal of the circuit court to permit a dismissal.

Among the quotations made by this court is the following (p. 714):

"So in the case of *Connor* v. *Drake*, 1 Ohio St. 170, the Supreme Court of Ohio, declared:

"'The propriety of permitting a complainant to dismiss

his bill is **a matter within the sound discretion of the Court,** which discretion is to be exercised with reference to the rights of **both** parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defence, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be **trifling with the court** as well as with the rights of defendants. We think the court hid not err in its ruling in refusing to permit complainant to dismiss his bill.' "

Some State Court Cases. For some Massachusetts cases, see p. 21, *supra*. In *Borrowscale* v. *Tuttle*, 5 Allen, 377, the bill called for an answer under oath, and thus the plaintiff had obtained discovery. The time for taking testimony dad expired. The plaintiff desired to dismiss so as to bring a new suit in which he might deprive the defendant of the benefit of an answer under oath. The Court said that this was a sufficient reason for refusing leave. *That is exactly our case.*

Rosse v. *Rust*, 4 Johns. Ch. 300 (1820). A bill dismissed generally for non-appearance when reached for hearing, *no evidence having been taken*, is not a bar to a new suit.

But, *Ogsbury* v. *LaFarge*, 2 Comstock, 113 (1848), decided that if evidence has been taken and published so that the cause is ripe for hearing, a dismissal is a bar. This case was *after Rosse* v. *Rust*, and after the cases in 8, 9, 11 Paige, and therefore overrules their *dicta*.

VIII. The Main Proposition on which the Petitioners Rest their Case, and the Answer to it.

At the outset of their argument (petitioners' brief, p. 17), they thus state it:

"The question for decision by the Court of Appeals was simply whether, *on the first day of June*, 1891, when the

plaintiff filed its motion to dismiss, the cause was in a condi tion *which* entitled the defendants to a decree upon the merits without further hearing by the chancellor."

In the next paragraph they give another statement of the same proposition; and we agree that it states the same proposition, because the *right* of a plaintiff to stop a case depends upon whether the court can proceed in his absence (p. 45 *supra*). They say:

"If the plaintiff, instead of filing a motion to dismiss on June 1, 1891, had withdrawn the appearance of its counsel and ceased to prosecute its suit, could the chancellor, *upon the record as it then stood*, have entered any decree except that the bill be dismissed for want of prosecution?" *

To which we reply (1) that the chancellor could have made a decree which would bar a new suit and (2) that the question propounded, if answered in favor of the petitioners, would still leave other elements in the case which would be fatal to their alleged right.

1. (*a*) When a case has gone to a master, the *defendant* may carry it to report, may have the report filed, and then confirmed, in spite of the plaintiff's refusal to proceed.

In *Collins* v. *Greaves*, 5 Hare 596 [WIGRAM V. C. 1847] the *defendant* moved to dismiss because the plaintiff did not prosecute the hearing before a master. The V. C. refused on the ground that "*either* party might procure a report."

Roberts v. *Williams*, 2 Hare, 151. *Either* party may have the report confirmed.

Our rules 73, 74 are explicit that the defendant may proceed *ex parte* before the master, and thus get the case heard and report made and filed. Rule 83 directs that unless the losing party actively assails the report, it *stands* confirmed on the next rule day.

These decisions and these rules imply, of course, that the hearing may be had and the report made and filed, in

* The *italics* of both quotations are in the original.

the absence of the plaintiff; and that when the report is filed, and especially after it is confirmed, although this be done *ex parte*, it has its due and full legal effect. Now a report, not objected to for errors or excess of power, but simply left with the case not prosecuted by the plaintiff, puts the case where the defendant can exercise *his* right to set the case for hearing; and when a case is reached for hearing on a confirmed report that the plaintiff is not entitled to any relief, and the plaintiff still stays away, the court enters a final decree which is an adjudication as broad as the report.

(*b*) In this case, moreover, the evidence had all been taken;* and a decree of dismissal after that, though upon default, will bar a new suit because the materials on which to base a decree on the merits are then in court. Cases on pp. 43, 47, 53, *supra*.

2. (*a*) In the vendor and purchaser cases (and so in the partnership cases) the cause was not ripe for a decree until the master had reported whether a good title could be made. But Lord Eldon and the other judges invariably refused leave to dismiss after the *reference* had been made. Cases on p. 37, *supra*.

(*b*) So in the various other cases cited on pp. 21, 39, *supra*, it was laid down that when a case had *gone* to a master under an order of reference or to a referee under an order of court, the parties had put themselves in a position where "*either may compel the other to make a final settlement of the dispute.*" The plaintiff cannot at his pleasure rescind the rule, "*and as he cannot do it directly, so he cannot effect the same object by a discontinuance or a non-suit.*"

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* Really all the evidence was taken *in the cause* before the case went to the master. The documents introduced before him were presented under a stipulation in the proofs that they might be read in evidence without being put on the files of the court. They were, however, at the request of the complainant, returned by the master.

IX. THE SUBMISSION TO THE MASTER BY CONSENT, CONFIRMED BY AN ORDER OF COURT, IS A BINDING ELECTION OF THAT MODE OF TRIAL AND IT CANNOT BE REVOKED DIRECTLY, NOR INDIRECTLY BY A WITHDRAWAL OF THE CASE.

In *Dexter* v. *Young*, 40 N. H. 130, and *Bray* v. *English*, 1 Conn. 498 (p. 39, *supra*), and in the Massachusetts cases on p. 21, *supra*, it was laid down that when the parties have *agreed* that the cause be submitted to a particular person selected, whose decision will have a certain legal value, or have agreed upon any mode of trial known to the law, and this agreement has become an order of court, they are bound to that particular mode of trial and have waived every right and privilege, if they had any, which would enable them to escape from it. "The object," said the Supreme Court of Connecticut, "is to place the parties in a situation such that *either may compel the other* to make a final settlement of the dispute"; and thus the plaintiff has given up his common law right "to withdraw his suit at pleasure and commence a new action." To permit a plaintiff to so play fast and loose, said the Supreme Court of New Hampshire, "could not be countenanced or tolerated." "By such an agreement," said the Supreme Court of Massachusetts, "the parties put themselves on trial before the court . . . We are therefore of the opinion that the plaintiff cannot at his pleasure rescind the rule and revoke the submission; and as he cannot do it directly, so he cannot effect the same object by a discontinuance or a non-omit."

In *Bank* v. *Rose*, 1 Rich. *Eq.* 292 (p. 22, *supra*) the Supreme Court of South Carolina said that after a case had been submitted, yet before decision, "it would be a reproach to the administration of justice, as said in *Bethia* v. *McKay*, if the plaintiff could withdraw the controversy, to be reopened

in another suit, by dismissing his bill; and it cannot be allowed."

All this had been for years known and settled law when these parties agreed upon this reference and had the decretal order for it entered.

True character of the plaintiffs' attempt. We have almost hesitated to enter into any technical argument upon the question, for fear of obscuring the great central fact of this case.

The plaintiffs tried the cause before the master, and pursued the due and legitimate course towards obtaining his judgment, and towards a review of it by the court, without a hint of repudiation, until they learned, and learned officially and formally, the master's conclusions; and, still further, had been refused a rehearing upon alleged new evidence.

In *Locke* v. *Wood*, 16 Mass. 317, the court (PARSONS, C. J.) confirmed by the full court, refused a non-suit after the jury had agreed upon a sealed verdict, but before it was announced, thinking that the verdict *might* have been communicated to the party.

In *Lawrence* v. *Burns*, 2 Browne, 60 (Pa.) the verdict read was so defective that it had to be recommitted to the jury to prepare a valid one. A non-suit asked at this juncture was refused.

Bank v. *Rose*, 1 Rich. Eq. (S. C.) 292, is to the same effect.

In *Holcomb* v. *Holcomb*, 23 Fed. R. 781, Justice BROWN, refusing a motion to dismiss, declared that a plaintiff who has "provoked a conflict with the defendant . . . should not be allowed, after a virtual defeat, to reap the fruits of a victory."

In *Rosenthal* v. *Coates*, 148 U. S. 147, this court said of Rosenthal, —

"Though as yet *no formal decree has been entered* in the trial court, it is none the less true that he has *experimented with the state courts* and been beaten, and now seeks a different forum."

No other result is thinkable in any system of jurisprudence. When a plaintiff has argued his case and submitted it, still more, when he has learned the judge's conclusions, it has passed out of his control. He may go away, but the case remains.

Conclusion.

We submit, therefore, that the case will not be ordered up on *certiorari*; because the order complained of is:

1. An interlocutory order, upon a question of practice, simply directing the trial of the merits to be completed in the usual way.

2. An order just in itself and within the control of the judges below; so that the decision conclusively fixes the practice; or, if it does not, a Rule would be made so establishing it.

3. Upon the precedents, the decision is right beyond possibility of controversy, and there is no "diversity of judgment" about it.

Respectfully submitted by

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Some Comments on the Petitioners' Brief.

The substance of the petitioner's brief, both as to argument and authorities, is sufficiently covered by what we have already said. We confine ourselves here to what are, in their nature, specific errors.

Petitioners' Brief, pp. 10–11. The variations between the "draft report" and the filed report, here noticed, are shown on pp. 28–9, *supra*, to relate to purely formal matters of detail, and not to indicate any change of views.

Petitioners' Brief, p. 13. The intimation that the draft report was not communicated to the parties is erroneous; *v.* p. 30, *supra*.

Petitioners' Brief, p. 15. The only petition for leave to dismiss which was made before the report was filed, was not only signed by one complainant alone, but was in the name of one complainant alone; and *that* complainant had no title to or beneficial interest in the controversy. The defect we believe to be fatal to the attempt to exercise what, if it exists at all, is a purely technical right. The brief is in error in saying that this fact was held by the Court of Appeals to be of no account as affecting the right of the complainants to dismiss. The court decided nothing of the sort. Having found against the complainants on the broad merits of the motion, it said, at the close, that "no account is made of the [this] point," *i. e.*, it was not necessary to consider it.

Petitioners' Brief, p. 15. Nor did the court rest its decision solely "upon the authority" of *Kimberly* vs. *Arms*, and *Davis* vs. *Schwartz*.

Petitioners' Brief, p. 17. The petitioners here state their main propositions, viz.: (1) that on June 1, 1891, the case was in such a condition that, if the plaintiff had then withdrawn, there could have been no decree except dismissal for want of prosecution; and (2) that a withdrawal by the plaintiff

at that moment would have absolutely disabled defendant, master, and court from proceeding further.

We have shown on p. 53, *supra*, that the settled rule is to the contrary on both these points.

Petitioners' Brief, pp. 20–21. The petitioners say that the English Order of 1845 "recognized and modified the then well-settled practice in the English chancery court, by which a plaintiff had a right to dismiss his bill on payment of costs at any time before a determination of the cause *by a decree upon the merits*."

No such practice was ever established, nor even suggested as thinkable, by the English decisions; nor did the Order of 1845 recognize any such practice. The *settled* practice in England was (*a*) that a reference to a master, even before a hearing by the court, terminated the right to dismiss; and (*b*) that where there had been no reference, the *opening* of a case to the court terminated; (*c*) the clear weight of both precedent and opinion was that *readiness* for hearing terminated the right, there being but one case which held that the hearing must actually have been begun.

Now, what the Order of 1845 did was simply to overrule *this one decision* and confirm the others in favor of the earlier date. But even that decision would be fatal to the petitioners because it establishes that a hearing actually had before a master is as effective to terminate the right as a report filed thereon. For this matter see our brief, pp. 35, 42, *supra*.

In the passage quoted from Judge Clifford's decision in *Badger* v. *Badger*, 1 Cliff. 237, and further discussed in the petitioner's brief, p. 36, Judge Clifford stated what clearly was not law, and what the case before him did not call for, and chiefly in reliance on a decision in New York which had long before been overruled by the Court of Appeals, the later decision being, apparently, not known to him.

The whole case and the decision are stated at the opening of his opinion, as follows:

"It appears that before the cause was set down for hearing, and before any of the testimony taken was published, the complainant moved to dismiss his bill, and, no objection being made thereto, the motion was granted, and the bill of complaint was accordingly dismissed without any hearing whatever upon the merits. On this state of the case I am of the opinion that the replication is a good answer to the plea, and that the record of the former suit and decree is no bar to the bill of complaint."

All discussion, therefore, as to what could or could not be done *after* publication of testimony, that is, according to our modern practice after the taking of testimony was closed, was wholly outside the case. The decision especially referred to and relied on by Judge Clifford as the basis of his dicta was *Rosse* v. *Rust*, 4 Johns. Ch. 300 [1820]. He does not seem to have been aware that exactly this point was decided the other way by the court of appeals, twenty-eight years later in *Ogsbury* v. *La Farge*, 2 Comstock, 113 [1848].

Petitioners' Brief, p. 27. The petitioners, at the middle of the page, represent Lord Eldon, in *Pickett* v. *Loggon*, as speaking of a case which had been actually *set for hearing*. Not so; the point he specified was "publication passed and the cause *capable* of being opened"; *i. e.*, when the materials were in court.

As we pointed out on p. 42, *supra*, defects of pleading prevented Lord Eldon from actually deciding the question; but Lord Eldon's expression of his opinion in the passage we quoted is certainly of controlling value.

Petitioners' Brief, p. 28. In *Handford* v. *Storie*, 2 Sim. and Stu. 196 [1825], here relied on by the petitioners, the question was neither raised nor considered. Storie filed a creditor's bill to reach some property pledged for various debentures. The defendant, though an agent, purchased Storie's claim, and then the bill was dismissed by consent of both plaintiff and defendant, no other creditor having come in to prosecute it. Subsequently another creditor filed a new bill, alleging that Storie's duty towards other creditors was

to prosecute the suit for their benefit, and to share with them whatever he received, even though they had not come in. The decision was that the suit might properly be dismissed before decree, *by consent of all who were parties to it at the time.*

White v. *Lord West-meath*, Beatty, 174 [1828], was a similar case. The defendant satisfied the creditor, and the bill was about to be dismissed by consent. Then the defendant's wife, who had quarrelled with him, asked to have the bill retained, in order that she might prosecute a claim for her jointure against the pledged property. The court declined to order this.

Bluck v. *Colnaghi*, 9 Sim. 411. The decision was that the bill could not be dismissed after a reference to a master had been made. But it is also the fact that *the order was by consent*, which makes the decision exactly cover our case in our favor, as stated on p. 38, *supra*.

Petitioners' Brief, p. 36. *Conn.* v. *Penn.*, 5 Wheat. 424. The point whether a decree of dismissal at the stage the case had reached would bar a new suit was, expressly, not decided. It was held that the principal defendant in interest in the former suit was not before the court in that suit, and that, *for that reason*, the decree of dismissal therein could not rank as a decree on the merits. The court said (page 427–8):

"It is not certain that the decree is on such a hearing as to be a bar to a future action; and this point is not positively decided. It is unnecessary to decide it, because we think the interlocutory decree was irregular, and ought not to have been made until William Penn, a tenant in common with John Penn, was before the court."

Petitioners' Brief, p. 36. The petitioners' statement of *Hopkins* v. *Lee*, 6 Wheat. 109, would seem to convey an erroneous impression of that decision, which, indeed, contains nothing bearing upon our case.

A master's report had been confirmed by the court because no exceptions were filed. This decree and the report were

offered as evidence in a subsequent suit. The Supreme Court *decided* that they were competent evidence to show what was decided in the former suit. The court added that it did not decide whether they were conclusive, *because* the case did not raise that question. It said (p. 117):

"We are not now called upon to say, whether, in those respects, they were conclusive, as they do not appear to have been offered with that view; but without meaning to deny to them such effect, we only say, which is all that the present case requires, that they were competent and proper, in the absence of other testimony, to establish the fact," etc.

Petitioners' Brief, pp. 49 and 51. *Cummins* v. *Bennett*, 8 Paige, 79 [1840]. What is here quoted is a *dictum;* and it was overruled eight years afterwards in *Ogsbury* v. *LaFarge*, 2 Comstock, 113 [1848], *q. v.* p. 53, *supra*. The same is true of *Watt* v. *Crawford*, 11 Paige, 470 [1845].

Petitioners' Brief, pp. 49–50. The statement of *Seymour* v. *Jerome*, Walker (Mich.) 356 [1844] is correct so far as it goes, to wit, that an order of reference to a master ends the right to dismiss. But the case seems to be used as if this effect followed only when the reference was after a hearing on the merits. The sentence quoted, *in a clause omitted in the quotation*, states that this follows from a decree by consent, which was the case before the court. See p. 39, *supra*, note.

Petitioners' Brief, p. 51. *Bullock* v. *Zilley*, 1 Halst. Ch. 77, is like *Handford* v. *Storie*, *q. v.*, *supra*.

Petitioners' Brief, p. 59. We have already pointed out that the right of a plaintiff in a suit at *law* to become non-suit depends upon a technicality which has long ago been repudiated in most States because of its injustice. See p. 32, *supra*.

Petitioners' Brief, p. 65. *Homer* v. *Brown*, 16 How. 354. The non-suit was by virtue of an *agreement to allow it*. See p. 31, *supra*. A judgment of non-suit, of course, is

not a bar. But an allowance of it *by agreement and consent*, has no bearing on the question of the right to it against objection.

Petitioners' Brief, p. 94. We pointed out below that when the parties were before the master for the purpose of objecting to the draft report, etc., the plaintiffs asked for and obtained a delay of thirty days for presenting and completing a petition for leave to take additional proofs (Record, p. 179). Having obtained this for a particular purpose, they cannot, we submit, use the subsequent time for an antagonistic and inconsistent purpose. *Curtis* v. *Lloyd*, cited on p. 44, *supra*, bears us out in that.

We have not made, and do not make, the quite different suggestion which seems to be attributed to us on p. 94.

The other parts of the petitioners' brief find their answer in the main body and tenor of our argument.